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NO. 96-1293

In The
Supreme Court of the United States
October Term, 1996

LORI G. McKENZIE,
Petitioner

vs.

RENBERG'S, INC. and ROBERT L. RENBERG,
Respondents

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a personnel director who has formed a good faith belief that her employer is violating the overtime pay requirements of the Fair Labor Standards Act engages in "protected activity" under §15(a)(3) of the Act when she reports her belief to the company's attorney and then to its president and principal owner, persists in that belief and then is fired in retaliation for expressing her belief.

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, Subdivision 6, Petitioner hereby replies to the Respondent's Brief in Opposition. In summary, Respondents' argument of the facts is misdirected. Respondents ignore compelling authority in favor of Petitioner's position. Respondents invite error by confusing "opposition" activity with "participation" activity.

I.
RESPONDENTS' ARGUMENT OF THE "FACTS" IS MISDIRECTED

Respondents attempt to point out misstatements of facts contained in the Petition for Certiorari (Brief in Opposition, pp. 3,4,5,12,15). Rather than address each of these attempts with citations to the record, Petitioner is satisfied to rely upon the Court of Appeals' own recitation of the facts (Petition, Appendix B, pp. 21a–23a). The Court there recognized quite accurately that the parties vigorously disputed the facts at trial. However, the Court's concern there, as should be this Court's concern, was whether under the Petitioner's evidence she had engaged in protected activity under the Fair Labor Standards Act.

The Court there noted that the District Court had instructed the jury that "good faith reporting or communicating concerns regarding possible FLSA violations is protected activity". By its decision in this matter, the Court of Appeals held that this instruction was erroneous as a matter of law. For, in the absence of the Petitioner's

stepping outside her role as an employee, her activity (no matter how the jury viewed it) could not be protected under the Act. It is this legal conclusion that the Petitioner attacks here. Respondents should not be heard to argue the facts when it is the law that is in question.

II.
RESPONDENTS' IGNORE THAT PETITIONER HAS HER OWN INDEPENDENT DUTIES UNDER THE FAIR LABOR STANDARDS ACT

In Subsection B of her Petition, Petitioner demonstrated that the Act imposed independent legal duties upon her as the personnel director of Renberg's. As such, the Act recognized her (and requires the courts to recognize her) as independent from her employer. Respondents fail to dispute this proposition; instead, they argue that the Court of Appeals' decision is not to the contrary.

Yet, Petitioner asserts that the decision under review is quite to the contrary. If Petitioner is independently subject to civil and criminal penalties for overtime pay violations, then she **cannot** be required to "cross the line". The law, by its very requirements, has already placed her over that line.

As Petitioner stated in her Petition (Petition, p. 8), the issue in this case is whether the independent legal duties imposed upon a personnel director are to be preferred over that person's status as a member of management. Petitioner maintains, and this Court should hold, that her status as employee must yield to the law in these circumstances. Such was the intent of Congress. This Court should countenance no other conclusion.

III.
RESPONDENTS' ERRONEOUSLY CONFUSE "OPPOSITION" ACTIVITY WITH "PARTICIPATION" ACTIVITY

At page 5 et seq. of the Respondents' Brief in Opposition, Respondents erroneously introduce the concept of "opposition" activity to the application of §15(a)(3) of the Fair Labor Standards Act. While not quoting directly from Title VII's employee protection statute (42 U.S.C. §2000 e–3) which protects employees from retaliation for both "opposition" activity and "participation" activity, Respondents repeatedly entreat the Court to read §15(a)(3) as if it covers both types of activity. To do so may serve the Respondents' purposes. Yet this confusion fails to provide this Court with able assistance in reviewing the Petitioner's Petition for Certiorari.

As stated above, the sole issue to be resolved on certiorari is the correctness of the District Court's instruction that, as a matter of law, the "good faith reporting or communicating concerns regarding possible FLSA violations is protected activity". By reporting her concerns, Petitioner invoked the proper corporate channels to investigate claims or proceedings that may be filed under the Act; she also alerted the company that she would be required to present testimony with regard to a claim or proceeding under the Act.

Respondents' attempt to blur the distinction between "opposition" activity and "participation" activity is mischievous. In a case cited on page 15 of Respondents' Brief, Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304 (6th Cir. 1989), the Sixth Circuit noted that:

> the distinction between employee activities protected by the participation clause and those protected by the opposition clause is significant because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings.

879 F.2d 1304, 1312.

Respondents would have this Court judge Petitioner's participation activity under the stricter guidelines which apply to opposition activity.

The Court of Appeals in Booker went on to illustrate the breadth that has been given to protection of an employee under the participation clause and noted the limitations upon such protection under the opposition clause. Under the facts before it, the Booker court held that a "vague charge of discrimination . . . is insufficient to constitute opposition to an unlawful employment practice", 879 F.2d 1304, 1313.[1]

Thus the Respondents invite this Court to indulge in the same error as did the Court of Appeals in this case: to require an employee to go beyond mere advocacy and to oppose in specific and direct terms an action of the employer. While such a requirement may be appropriate to gauge opposition activity, Petitioner asserts it has no place in gauging participation activity of the type involved here.

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[1] To the same effect, see the other case cited at page 17 of the Respondents' Brief in Opposition, Aldridge v. Tougaloo College, 847 F.2d 480 (S.D. Miss. 1994), where an employee's complaint of unfair treatment did not invoke the opposition clause of Title VII. To the same effect, see Garcia-Paz v. Swift Textiles, Inc., 873 F.Supp. 547 (D.Ks. 1995) wherein opposition to "paradigms" and "inflexibility" was not sufficiently specific to constitute opposition to age discrimination.

Petitioner's reporting of her concerns to her employer alerted the company of the potentiality of adverse claims and proceedings for which she herself could be held liable. More significantly, she alerted the company that her testimony in such proceedings would be adverse to the company, or adverse to her own interest.

Still yet, there was no vagueness or lack of specificity in Petitioner's explanation of her concerns to the company attorney and its president. She directed their attention specifically to the overtime requirements of the Fair Labor Standards Act. She specifically expressed her belief that the company's practices violated the Act with regard to two broad categories of employees. That she asked the company attorney for his opinion at the same time does not detract from the obvious purpose of her visit to the attorney's office: to alert the proper corporate authorities of suspected illegalities.

Petitioner's conduct fits easily within the protective reach of §15(a)(3); more easily, in fact, than the actions of employees in other cases which have been found to be covered by the Act. In Love v. RE/MAX of America, 738 F.2d 383 (10th Cir. 1984), the employee, a vice–president, wrote a memo to the president asking for a raise, to which she attached a copy of the Equal Pay Act. In EEOC v. Romeo Community Schools, 976 F.2d 985 (6th Cir. 1992), the employee, a custodian, complained to her employer that she believed it was "breaking some sort of law". In Cuevas v. Monroe Street City Club, Inc., 752 F.Supp. 1405 (N.D. Ill. 1990), employee Robinson complained at a staff meeting that he "was not getting paid for certain things he was doing".

Similarly, in York v. Wichita Falls, 944 F.2d 236 (5th Cir. 1991), the Court of Appeals found that simply

handing a legal memorandum to, and asking a question of, a supervisor could be considered an assertion of rights under the Act.[2]

By these examples, lack of clarity or directness of purpose has never been an impediment to invoking the protection of §15(a)(3). In none of these cases did the court have difficulty in finding that the employee had sought "access to statutory remedial mechanisms". Neither should this Court succumb to the Respondents' sophistry.

IV.
GUIDANCE FROM THIS COURT IS NEEDED TO GUARANTEE "UNFETTERED ACCESS TO STATUTORY REMEDIAL MECHANISMS"

As ably pointed out in the Amicus Curiae Brief in Support of Petitioner's Petition for Writ of Certiorari submitted herein by the Society for Human Resource Management, this Court has recently repeated that the primary purpose of anti-retaliation statutes is: to maintain "unfettered access to statutory remedial mechanisms", Robinson v. Shell Oil Company, _____ U.S. _____, 1997 WL 63007 (1997). By granting writ of certiorari in this case, the Court should provide clear guidance to the District Courts and to the Courts of Appeal in protecting employees coming within the ambit of §15(a)(3). To do so now would provide uniformity of enforcement of the Act, rather than the doctrinal confusion that obtains today.

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[2] See also, Drollinger v. State of Arizona, 962 F.2d 956 (9th Cir. 1992), where discussing a recent Supreme Court decision with state officials was considered an assertion of rights under the Act.

WHEREFORE, for the reasons stated in her Petition and in this Reply, Petitioner earnestly prays that this Court grant a Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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